

IN THE HIGH COURT OF PUNAJB AND HARYANA AT
CHANDIGARH

Regular Second Appeal No. 1029 of 1988
Date of Decision: December 12, 2007

Ram Kishan and others Appellants

versus

Sheo Ram and others Respondents

CORAM: Hon'ble Mr. Justice Uma Nath Singh
Hon'ble Mr. Justice Hemant Gupta
Hon'ble Mr. Justice Rajive Bhalla

PRESENT: Shri J.S. Bhatia, Advocate for the appellants.
Shri Raghvinder Singh, Advocate for the respondents.

1. Whether Reporters of local papers may be allowed to see the judgment ?
2. To be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest ?

HEMANT GUPTA, J.

The appellant, a mortgagee, filed a suit for declaration to the effect that they have become owners of the agricultural land measuring 13 Kanals 6 Marlas by prescription. The case set up was that one Ami Chand son of Devi Singh mortgaged with possession agricultural land measuring 14 Bighas for a sum of Rs.80/- with Hardhan Singh son of Jit Ram on 11.8.1903. During consolidation operations, the land measuring 13 Kanals 6 Marlas was allotted in lieu of the original mortgaged land. The plaintiff claims to be in continuous possession of the suit land as mortgagees, whereas Munshi Ram, predecessor-in-interest of defendants,

was recorded as mortgagor. The mortgagees sought the declaration on the ground that the suit land has not been got redeemed during the period of more than 60 years and, therefore, the defendants have lost all right, title and interest in it. Though the defendant denied the factum of mortgage, but the trial Court returned a finding that it was a case of usufructuary mortgage and no period for payment of mortgage amount was fixed. It was observed that it is not the case of the plaintiff that they had made a demand for mortgage amount, which was refused by the defendant. Thus, no cause of action had accrued to the plaintiff which could only accrue on demand of the mortgage amount from the defendants and refusal of the same by the defendants. The trial Court, thus, dismissed the suit holding that the plaintiffs have not become owners of the suit land.

The appeal against the judgment and decree passed by the learned trial Court was also dismissed and hence, the mortgagees are in second appeal claiming declaration in respect of their ownership over the suit property.

Initially this appeal was admitted to D.B. in view of the important questions of law likely to arise in many cases. Later, in Regular Second Appeal No. 893 of 2006, the mortgagee, who was in appeal, raised an argument that in case of usufructuary mortgage, where no time limit is fixed to seek redemption, the time to seek redemption will arise on the date of mortgage itself. The said appeal was admitted to Division Bench in view of the important question of law. Many other appeals were ordered to be heard with these appeals.

The Division Bench while hearing the present appeal along with other appeals framed the following questions for opinion of the

larger Bench:-

1. Whether the right to seek redemption would arise on the date of mortgage itself in case of usufructuary mortgage when no time limit is fixed to seek redemption?
2. Whether there is any time limit in the case of a usufructuary mortgagor to get his property redeemed?

The Transfer of Property Act, 1882 (for short 'the Act') is as such not applicable to the States of Punjab and Haryana. Sections 54, 107 and 123 of the Act were extended to the then State of Punjab with effect from 1.4.1955 and to the Pepsu area of the State of Punjab with effect from 15.5.1957. Section 59 was extended to whole of Punjab with effect from 10.6.1968. Section 58 (g) of the Act, has been extended to district headquarters in the State of Punjab vide notifications dated 28.8.1975; to all the block headquarters vide notification dated 23.6.1979; Mandi Gobindgarh in District Fatehgarh Sahib and Mohali in Ropar vide notification dated 28.5.2001. The provisions of Sections 59 and 58 (f) have been extended to the State of Haryana with effect from 5.8.1967 and 10.5.1972, respectively. Section 58 of the Act was extended to the area of Chandigarh with immediate effect vide notification dated 18.12.1982. The provisions of Section 118 of the Act were extended to urban area of the State of Punjab vide notification dated 10.8.1989.

The facts remains that the provisions of Section 58 (d) of the Act and other provisions in respect of usufructuary mortgage have not been made applicable to the areas falling within the jurisdiction of this Court, though such mortgages are required to be made by way of registered document in the State of Punjab w.e.f. 10.6.1968 and from 5.8.1967 in the State of Haryana. It is also equally well settled that if the provisions of the

Act are not applicable to the area, the principles of justice, equity and good conscience are to be applied while determining the rights of the parties.

The Constitution Bench of the Hon'ble Supreme Court in **Murari Lal v. Dev Karan, AIR 1965 SC 225**, considered the question “Does the equitable doctrine ensuing the mortgagors equity of redemption in spite of a clog created on such equity by stipulation in the mortgage deed apply to the present case ? That was a case arising from Alwar (Rajasthan) where the provisions of the Act did not apply. The Court concluded as under:-

“These decisions show that the High Courts in India conformed to the view that whether or not there is a statutory provision directing the Judges to give effect to the principles of justice, equity and good conscience, it is their duty to enforce that principle where they are dealing with stipulations introduced in mortgage transactions which appear to them to be unreasonable, oppressive or unjust.”

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“..... In fact, in *Namdeo Lokman Lodhi v. Narmadabai* this Court has emphatically observed that it is axiomatic that the courts must apply the principles of justice, equity and good conscience to transactions which come before them for determination even though the statutory provisions of the Transfer of Property Act are not made applicable to these transactions. These observations, in substance, represent the same traditional judicial approach in dealing with oppressive, unjust and unreasonable restrictions imposed by the mortgagees on needy mortgagors when mortgage documents are executed.”

In the judgment reported as **Harbans Singh and another**

v. Guran Ditta Singh and another, (1991) 2 SCC 523, the Hon'ble Supreme Court while dealing with the mortgage in a case arising out of Punjab, held to the following effect:-

“We hold that applying the principle of justice, equity and good conscience though Section 60 of the Transfer of Property Act per se did not apply, the principles of Section 60 would apply. Though the application for redemption was dismissed under Section 11 of the Act and became conclusive under Section 12 the mortgagor's right to redemption is not barred. A suit for redemption under Section 60 of Transfer of Property Act will be maintainable and civil court has jurisdiction to grant the decree of redemption.”

Thus, the provisions of the Act in respect of usufructuary mortgage are required to be interpreted keeping in view the principles of justice, equity and good conscience and keeping in view the fact that the stipulations introduced in the mortgage transactions are not unreasonable, oppressive and unjust.

The relevant provisions contained in Sections 58 (a), 58 (d), 60, 62, 67 of the Act and Articles 61, 62 and 63 of the Limitation Act, 1963 (hereinafter to be referred as “the Limitation Act”), are being reproduced as under:-

“58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgaged" defined. (a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

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(d) Usufructuary mortgage-Where the mortgagor delivers

possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called a usufructuary mortgage and the mortgagee a usufructuary mortgagee.

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60.Right of mortgagor to redeem

At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by the act of the parties or by decree of a court. (emphasis supplied)

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62. Right of usufructuary mortgagor to recover possession

In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee,-

(a) where the mortgagee is authorised to pay himself the mortgage-money from the rents and profits of the property,-when such money is paid;

(b) where the mortgagee is authorised to pay himself from such rents and profits or any part thereof a part only of the mortgage-money,-when the term (if any) prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the mortgage-money or the balance thereof or deposits it in court hereinafter provided.

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67. Right to foreclosure or sale

In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become due to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property, or a decree that the property be sold.

A suit to obtain a decree that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed-

(a) to authorise any mortgagee other than a mortgagee by conditional sale or a mortgagee

under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or a usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale; or

Articles 61, 62 and 63 of the Limitation Act, 1963

61. By a mortgagor- (a) to redeem or recover possession of immovable property mortgaged;	Thirty years	When the right to redeem or to recover possession accrues.
(b) to recover possession of immovable property mortgaged and afterwards transferred by the mortgagee for a valuable consideration;	Twelve years	When the transfer becomes known to the plaintiff.
(c) to recover surplus collections received by the mortgagee after the mortgage has been satisfied.	Three years	When the mortgagor re-enters on the mortgaged property.
62. To enforce payment of money secured by a mortgagee or otherwise charge upon immovable property.	Twelve years	When the money sued for become due.
63. By a mortgagee- (a) for foreclosure,	Thirty years	When the money secured by the mortgagee become due.
(b) for possession of immovable property mortgaged.	Twelve years	When the mortgagee becomes entitled to possession.

The primary reliance of the learned counsel for the appellant is on the judgment of the Hon'ble Supreme Court in **Prabhakaran and others v. M. Azhagiri Pillai, (2006) 4 SCC 484** and **Sampuran Singh and others v. Niranjan Kaur (Smt.) and others, (1999)2 SCC 679**, to

contend that in case of usufructuary mortgage, where no time limit is fixed for redemption, the right to redeem will accrue to the mortgagor on the date of mortgage itself and therefore, failure to redeem the mortgage within the period prescribed under Article 61 of the Act will lead to closure of the option of the mortgagor to seek redemption. Thus, the appellants are entitled to the declaration in respect of their title over the suit property. Reference is also made to the Full Bench judgment of this Court reported as **Shri Chand and others v. Nathi, 1983 PLR 288; Satnam Singh alias Shamsher Singh and others v. Roshan Lal and others, 1986 PLJ 504 and B. Ramman Lal v. Raghunath Shanker and another, AIR 1941 Allahabad 56**, to contend that the right of redemption in the cases of usufructuary mortgage, where no time limit is fixed arises on the date of mortgage itself. It is contended that in terms of Section 60 of the Act, the failure to redeem the property within the time prescribed, entitles a mortgagee to seek declaration to debar a mortgagor to seek redemption as contemplated in the proviso of the aforesaid Section. It is also argued that the principle that once a mortgage is always a mortgage means that once a transaction is in the form of mortgage, it cannot be converted into any other transaction even of by the acts of the parties and that dehors the provisions of the statute and principles of law, the nature of the transaction as a mortgage would remain intact till the period of limitation alone.

On the other hand, learned counsel for the mortgagor-respondents relied upon **Ganga Dhar v. Shankar Lal and others, AIR 1958 SC 770, Jayasingh Dnyanu Mhoprekar and another v. Krishna Babaji Patil and another, AIR 1985 SC 1646; Panchanan Sharma v. Basudeo Prasad Jaganani and others, AIR 1995 SC 1743 and Harbans**

v. Om Prakash and Ors., AIR 2006 SC 686, to contend that the usufructuary mortgagor has a right to redeem the property at any point of time in a case where no time limit is fixed for redemption. It is contended that in case where time limit is fixed, the right of redemption will arise on the date fixed for redemption but where no time limit is fixed, the mortgagor has the right to seek redemption at any time on payment of the mortgage debt.

Before we refer to the judgments cited by the counsel for the parties and other precedents in respect of the issues arising in the present appeal, we would like to refer certain general principles in respect of usufructuary mortgage.

In **Santley v. Wilde, 1895-89 All India England Reports 1338**, a judgment of Court of appeal, it has been held as under:-

“The principle is this : a mortgage is a conveyance of land or an assignment of chattles as a security for the payment of debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is therefore void. It follows from this, that “once a mortgage always a mortgage”.

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“The courts of equity have fought for years to maintain the doctrine that a security is redeemable on the performance of the obligation for which it was given. If the obligation is the payment of debt, the security is

redeemable on the payment of that debt. That in my opinion is the true principle applicable to the cases, and that is what is meant when it is said that there must not be any clog or fetter on the equity of redemption.”

In authoritative commentary on the Act, by Mulla (9th Edition), certain statements are relevant. They read as follows :

“In an usufructuary mortgage, a transfer is made of the right of possession and enjoyment of the usufruct. The rights of a usufructuary mortgagee forms part of the bundle which constitute ownership. The remainder still remains with the mortgagor and can be transferred by him. The mortgagor's right is as indicated in section 60 of the Act i.e. after the principal money has become due, the mortgagor has a right to pay the mortgage money and on such payment, he has the right to require the mortgagee to deliver possession. This right cannot be extinguished except by the act of parties or by a decree of a Court. This right is called the right to redeem and a suit to enforce it is called a suit for redemption. Thus the scope of a suit for redemption is preliminary to enforce the right to make a payment of the mortgage money. A claim to redeem a mortgage actually does not attach to the land, although the decree passed in the suit may ultimately affect possession which is also an interest in land.

The section is not prefaced by any such words as 'in the absence of a contract to the contrary'. The right of redemption is therefore a statutory right which cannot be fettered by any condition which impedes or prevents redemption. Any such condition is void as a clog on redemption.....”

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“.....The mortgagor's right of redemption is exercised by the payment or tender to the mortgagee at the proper time and the proper place, of the mortgage money. When it is

extinguished by the act of parties, the act must take the shape and observe the formalities which the law prescribes. The expression 'act of the parties' refers to some transaction subsequent to the mortgage and standing apart from the mortgage transaction. A usufructuary mortgagee cannot by mere assertion of his own or by a unilateral action on his part, convert his position on moiety of the property as mortgagee into that of an absolute owner..."

The authoritative work of Dr. Rashbehary Ghose's "Law of Mortgage", which has received the approval of the Full Bench of Lahore High Court in **Lachhman Singh v. Natha Singh through Harnam Singh and others, AIR 1940 Lahore 401** and recently in **Achal Das Durgajit Oswal (Dead) through LRs. v. Ramvilas Gangabisan Heda (dead) through LRs. and others, (2003)3 SCC 614**, the maxim 'once mortgage, always a mortgage' has been explained as under (Eighth Edition – Page Nos. 280-281) under the heading "Once a Mortgage, always a mortgage":-

"In 1681 Lord Nottingham in the leading case of *Harris v. Harris* [(1681) 1 Vern 33] firmly laid down the principle: 'Once a mortgage, always a mortgage.' This is a doctrine to protect the mortgagor's right of redemption: It renders all agreements in a mortgage for forfeiture of the right to redeem and also encumbrances of or dealings with the property by the mortgagee as against a mortgagor coming to redeem. In 1902 the well-known maxim, 'once a mortgage, always a mortgage' was supplemented by the words 'and nothing but a mortgage' added by Lord Davey in the leading case of *Noakes v. Rice* [1902 AC 24 (HL): 1900-3 All ER Rep 34], in which the maxim was explained to mean 'that a mortgage cannot be made irredeemable and a provision to that effect is void'. The maxim has been supplemented in the

Indian context by the words 'and therefore always redeemable', added by Justice Sarkar of the Supreme Court in the case of *Seth Ganga Dhar v. Shankarlal* [1959 SCR 509 (513): AIR 1958 SC 770].

It is thus evident that very conception of mortgage involves three principles. First, there is the maxim: 'Once a mortgage, always a mortgage.' that is to say, a mortgage is always redeemable and if a contrary provision is made, it is invalid. And this is an exception to the aphorism, *modus et conventio vincunt legem* (custom and agreement overrule law). Secondly, the mortgagee cannot reserve to himself any collateral advantage outside the mortgage agreement. Thirdly, as a corollary from the first another principle may be deduced, namely, 'once a mortgage, always a mortgage, and nothing but a mortgage'. In other words, any stipulation which prevents a mortgagor from getting back the property mortgaged is void. That is, a mortgage is always redeemable.

The maxim 'once a mortgage, always a mortgage' may be said to be a logical corollary from the doctrine, which is the very foundation of the law of mortgages, that time is not of the essence of the contract in such transactions; for the protection which the law throws round the mortgagor might be rendered wholly illusory, if the right to redeem could be limited by contract between the parties [For a very curious case mentioned in the books in which the mortgagor was permitted to redeem, although he had solemnly sworn on the Bible never to exercise the right, see *Stisted's case* cited in *East India Co. v. Atkyns* 1 Comyn 348]. Right to redeem is an incident of a subsisting mortgage and is inseparable from it so that the right is co-extensive with the mortgage itself. The right subsists until it is appropriately and effectively extinguished either by the

acts of the parties concerned or by a proper decree of the competent court.”

With the said comments of the leading commentators on the subject, we revert to precedents on the subject. A Full Bench of the Lahore High Court in **Lachhman Singh's case (supra)** has delineated the characteristics of an usufructuary mortgage as under:-

“It will be seen that the characteristics of a usufructuary mortgage, as defined above, are : (1) that the possession of the mortgaged property is delivered, or agreed to be delivered, to the mortgagee; **(2) that he is to appropriate the rents and profits either (a) in lieu of interest, or (b) towards the principal, or (c) partly in lieu of interest and partly in payment of the principal;** (3) that in none of these cases the mortgagor incurs any personal liability to repay; and **(4) as the mortgagor has not bound himself to repay (but may repay if and when he chooses) there can be no “forfeiture” and therefore the remedies by way of foreclosure or sale are not open to the mortgagee.**”(emphasis supplied)

Thus, any personal liability on the part of mortgagor is excluded in case of usufructuary mortgage and a usufructuary mortgagee is not entitled to sue for sale of the property. If there is any stipulation to the contrary, the transaction ceases to be one of usufructuary mortgage and is described as anomalous mortgage. The Court proceeded to hold as under:-

“As stated in (2) above, usufructuary mortgages are of three kinds. Of these, the two described in (b) and (c) are self redeeming; the mortgagee has to look to the rents and profits only to re-pay himself and when his entire charge is so liquidated he must re-deliver

possession of the mortgaged property to the mortgagor free from all encumbrances.”

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“The most common form of usufructuary mortgage however is that described in 2(a) above, and it is to this class that the mortgages in the cases before us belong. Here the rents and profits are to be set off against interest and the mortgagee is entitled to retain possession until such time as the mortgagor chooses to redeem on payment of the principal sum secured. This form of mortgage has been in vogue in India since ancient times. It was known to the Hindu lawyers under the expressive name of *bhog bandakam* which literally means “mortgage (bandaka) by enjoyment (bhog).” It was a mortgage for an indefinite period, during which the mortgagee enjoyed the usufruct and the mortgagor was entitled to redeem at any time on payment of the principal. It retained its popularity during the Mughal period, especially among the Mohammedan creditors who by obtaining possession of property (as zer-i-peshgi lessee and under other similar names) and appropriating the rents and profits till redemption, could find a safe investment for their money without charging interest.”

The Court concluded to the following effect:-

“It will be clear from the foregoing discussion that the principal characteristics of a usufructuary mortgage are that there is no personal liability of the mortgagor to pay, nor has the mortgagee a right to have the mortgaged property brought to sale.”

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“Judged in this light, it must be conceded that a usufructuary mortgagor is under no liability to

mortgagee. He is under no legal obligation to pay; it is his option to redeem, if and when he chooses....”

In Ramprasad vs. Bishambhar Singh, AIR 1946

Allahabad 400, the Court while examining the provisions of section 60 of the Act held that it applies to a case in which the mortgagor goes to the Court to obtain the return of his property on repayment of debt amount still due. On the other hand, section 62 of the Act applies in the case of usufructuary mortgage. The mortgagor has a right to recover possession of the property when the principal money is paid off, where the mortgagee is authorized to pay himself the mortgage money out of the rents and profits of the property. It was held that is not a case of redemption at all. When the rents and profits of the mortgaged property discharge the principal amount secured by the mortgage, the mortgage came to an end and the correlative right arise in the mortgagor to recover possession of the property. The said judgment was affirmed by the Hon'ble Supreme Court in **Prithi Nath Singh and others vs. Suraj Ahir and others, AIR 1963 Supreme Court 1041**.

A Division Bench of Patna High Court in **Jadubans Sahai and others vs. Bahuria Phulpati Kuer and others, AIR 1957 Patna 452**, considered the scope of sections 60 and 62 of the Act. While considering section 60 of the Act, it was observed that suit for redemption of a usufructuary mortgage necessarily involves a prayer for possession of the mortgaged property. It is essentially a suit for both redemption and possession of the mortgaged property. But, there may be cases where the mortgagor may claim only possession of the mortgaged property and for this provision has been made in section 62 of the Act. The Court found that in terms of clause (a) of section 62 of the Act, the only relief which the mortgagor can claim is return of possession when by the contract between

the parties, the mortgagee is authorised to recover the mortgage debt from usufruct of the property in mortgage. Clause (b) of section 62 of the Act contemplates cases where the rents and profits of the mortgaged property are to be applied towards interest accruing due on the mortgage debt or towards principal or partly towards principal and partly towards interest. It was held that section 62 of the Act comes into operation, where in terms of the contract between the parties, the mortgagee is authorised to appropriate the rent and profits of the mortgaged property towards partial deduction of either the principal amount or interest or both. The Court held to the following effect:

“There may be cases where accounts may have to be taken before a redemption of the mortgage is granted. Wherever, the mortgagor claims satisfaction of the mortgage debt with the usufruct, the suit is not necessarily a suit for possession. In a pure redemption suit also there may be a prayer for account for redemption and for possession. If the mortgagor claims that the entire mortgage money had been satisfied and nothing is due on the basis of the mortgage, it is for the Court to determine whether or not there is satisfaction of the mortgage. Therefore, such an allegation is immaterial so far as the determination of the question whether the suit is one for possession or one for redemption is concerned. In my opinion, a suit purely for possession arises only when the case falls under clause (a) of section 62”.

While considering the question that when limitation begins to run under Article 148 (now Article 61 of the Limitation Act, 1963), the Court found that if suit is for possession under Section 62 of the Act, the period of limitation starts from the date on which the right to

recover possession accrues, and that will be after the mortgage money has been paid off in the circumstances mentioned in Section 62.

In **Pomal Kanji Govindji and others vs. Vrajalal Karsandas Purohit and others etc, AIR 1989 SC 436**, the Court examined the principles of redemption of a mortgage and clog on equity of redemption. The Court observed that freedom of contract is permissible provided it does not lead to taking advantage of the oppressed or depressed people. The law must transform itself to the social awareness. Poverty should not be unduly permitted to curtail one's right to borrow money on the ground of justice, equity and good conscience on just terms. If it does, it is bad; whether it does or does not, must, however, depend upon the facts and the circumstances of each case. The Court proceeded to hold to the following effect:-

“26. It is a right of the mortgagor on redemption, by reason of the very nature of the mortgage, to get back the subject of the mortgage and to hold and enjoy as he was entitled to hold and enjoy it before the mortgage. If he is prevented from doing so or is prevented from redeeming the mortgage, such prevention is bad in law. If he is so prevented, the equity of redemption is affected by that whether aptly or not, and it has always been termed as clog. Such a clog is inequitable. The law does not countenance it.....

27. These principles have been recognised by this Court in *Ganga Dhar v. Shankar Lal*, (AIR 1958 SC 770)(supra). It has also to be borne in mind that long term for redemption in respect of immovable properties was prevalent at a time when things and the Society were, more or less, in a static condition. We live in changing circumstances. Mortgage is a security of loan. It is an axiomatic principle of life and law that

necessitous men are not free men. A mortgage is essentially and basically a conveyance in law or an assignment of chattels as a security for the payment of debt or for discharge of some other obligation for which it is given. The security must, therefore, be redeemable on the payment or discharge of such debt or obligation. Any provision to the contrary, notwithstanding, is a clog or fetter on the equity of redemption and, hence, bad and void. “Once a mortgage must always remain a mortgage”, and must not be transformed into a conveyance or deprivation of the right over the property”.

In terms of proviso to section 60 of the Act, any mortgage including usufructuary mortgage can be extinguished only by act of the parties or by decree of the Court. The said expressions have been considered in numerous judgments. We shall examine the meaning of each of the expressions i.e., by act of the parties or by decree of the Court, in detail hereinafter.

Right of redemption when extinguished by a decree of the Court:

One of the earliest judgments examining the said expressions is **Raghunath Singh and others vs. Mt. Hansraj Kunwar and others, AIR 1934 Privy Council 205**. The question in the aforesaid case was whether on account of non payment of the mortgage amount in terms of the decree extinguishes the right of the mortgagor to seek redemption. In the aforesaid case, the plaintiff was granted time to deposit the mortgage amount and, in case of default, it was ordered that his case will stand dismissed. It was held to the following effect:-

“.....The right to redeem is a right conferred upon the mortgagor by enactment, of which he can only be deprived by means and in manner enacted for that purpose, and strictly complied with. In the present case,

the only basis for the claim that the right to redeem has been extinguished is Section 60; but in their Lordships' view the old decree cannot properly be construed as doing that which it does not purport to do, viz., as extinguishing the right to redeem.

No authority was cited to their Lordships in any way conflicting with the view which they have formed. 24 All. 44 (2) was a case of a usufructuary mortgage. The proper decree in a suit to redeem such a mortgage ought to have provided that in default of redemption the property should be sold. In fact it provided that in a case of default the judgment should be deemed non-existent. It was held by the Full Bench that a second redemption suit was maintainable.....”

The Federal Court in **Thoda China Subha Rao and others vs. Mattapalli Raju and others, AIR 1950 Federal Court 1**, considered the judgment of Privy Council and found that the Civil Procedure Code dealt with the procedure relating to all suits. There was a special law which dealt with the rights of the mortgagors and mortgagees and that substantive law was found to be in the Transfer of Property Act. That substantive law provided only two ways in which the right of redemption can be extinguished and they were : (i) by act of the parties, (ii) by decree of the Court. It was held to the following effect:-

“ In our opinion, the view of the Madras High Court is incorrect. We prefer the view taken by the Bombay High Court on this point, The right of redemption is an incident of a subsisting mortgage and it subsists so long as the mortgage itself subsists. As held by the Privy Council in *Raghunath Singh's case*, 61 I.A. 362 (AIR (21) 1934 P.C.205) the right of redemption can be extinguished by a decree, the decree should run strictly in accordance with the form prescribed for the purpose.

Unless the equity of redemption is so extinguished, a second suit for redemption by the mortgagor, if filed within the period of limitation, is not, therefore, barred. The Board expressly held that if the appellants failed to establish that the old decree extinguished the right to redeem, there was no ground for saying that the old decree operated as res judicata and the Courts are prevented from trying the second suit under S.11, Civil P.C. They, therefore, held that the right to redeem was not extinguished by the procedural provisions contained in the Civil Procedure Code.”

In K. Parameswaran Pillai (dead) vs. K. Sumathi alias Jesis Jessie Jacqueline and another, (1993) 4 Supreme Court Cases 431, while considering the provisions of Order 34 Rules 7 and 8 of the Code of Civil Procedure, 1908 (hereinafter to be referred as “the Code”), it was held that by operation of sub-rule (1) of Rule 8 where, before a final decree debarring the plaintiff from all rights to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed under sub-rule (3) of Rule 8, the plaintiff makes payment into court of all amounts due from him, the final decree is discharged. It was further held to the following effect:-

“.....The resultant operation of the law would be that in the case of usufructuary mortgage, the plaintiff need not make any application for extension of time fixed in the preliminary decree. The mortgage/ defendant has no right to make an application to foreclose the right of the plaintiff or sale of hypotheca declaring that the plaintiff has been debarred from making payment in court or to proceed further. At any time before passing of final decree or confirmation of the sale held in pursuance of the final decree the plaintiff usufructuary mortgagor has

been given right to make payment of the redemption money due under preliminary decree and the subsequent liability incurred thereon. The outer limit for making such payment is passing of the final decree or confirmation of the sale made in furtherance thereof. The final decree for foreclosure or sale or redemption in relation to other mortgages, the right of payment has been hedged with the duty to deposit the money declared or quantified in the preliminary decree within the time specified under the preliminary decree or extended period from time to time till final decree debarring the plaintiff from redemption etc is passed. The outer limit for a usufructuary mortgagor for making payment of the amount due under the preliminary decree, is passing of the final decree or the date of confirmation of the sale”.

It was also held that in case of usufructuary mortgage clause (a) of sub-rule (3) of Rule 8 expressly excludes the right to the mortgagee to apply for foreclosure or sale or redemption. Necessary consequence is that so long as the right subsists, though there is delay in compliance of the condition imposed in the preliminary decree, the right of redemption to the mortgagor is not lost.

In Achaldas Durgaji Oswal (dead) vs. Ramvilas Gangabisan Heda (dead) through L.Rs. and others, (2003) 3 Supreme Court Cases 614, the Court quoted with approval the principle of law authored by Dr. Rashbehary Ghose, as reproduced above, and other eminent writers and held to the following effect while considering the statutory right of mortgagee in terms of section 60 of the Transfer of Property Act, 1882, and Article 61 of the Limitation Act, 1963:-

“ 20. The statutory provisions, as noticed hereinbefore, are required to be construed having regard to the

redeeming features of usufructuary mortgage, namely, (a) there is a delivery of possession to the mortgage, (b) he is to retain possession until repayment of money and to receive rents and profits or part thereof in lieu of interest, or in payment of mortgage-money, or partly in lieu of interest and partly in payment of mortgage-money, (c) there is redemption when the amount due is personally paid or is discharged by rents or profits received and (d) there is no remedy by sale or foreclosure.

22. The right of redemption of a mortgagor being a statutory right, the same can be taken away only in terms of the proviso appended to Section 60 of the Act which is extinguished either by a decree or by act of parties. Admittedly, in the instant case, no decree has been passed extinguishing the right of the mortgagor nor has such right come to an end by act of the parties.

23. A right for obtaining a final decree for sale or foreclosure can be exercised only on payment of such money. Such a right can be exercised at any time even before the sale is confirmed although the final decree might have been passed in the meanwhile. The mortgagee is also not entitled to receive any payment under the preliminary decree nor is the mortgagor required to make an application to recover before paying the same.

24. Even, indisputably, despite expiry of the time for deposit of the mortgaged money in terms of the preliminary decree, a second suit for redemption would be maintainable”.

Thus the right to seek redemption continues to exist at all times but before the confirmation of sale of the mortgaged property irrespective of the decree of sale being granted. In fact even another suit to seek redemption would be maintainable .

In view of the aforesaid judgments, it can be safely concluded that right to redemption exist at all times but before confirmation of sale. Even second suit for redemption has been found to be maintainable.

Extinguishment of right of redemption by act of parties:

Now we will examine the extinguishment of right of redemption by act of the parties. Hon'ble Supreme Court in **Narandas Karsondas vs. S.A. Kamtam and another, AIR 1977 SC 774**, was seized of a question where the mortgagee under English mortgage had a power to sell the mortgaged property without the intervention of the Court. The mortgagee has sold the properties after giving notice to the mortgagor. The question arose whether the mortgagor can exercise his right of redemption after such sale. The Court held that right of redemption will be only on execution of conveyance and registration of transfer of mortgagor's interest by registered document. The conferment of power without the intervention of the Court in a mortgage deed by itself will not deprive the mortgagor of his right to redemption. It was held as under:-

“....The extinction of the right of redemption has to be subsequent to the deed conferring such power. The right of redemption is not extinguished at the expiry of the period. The equity of redemption is not extinguished by mere contract for sale”.

In **Parichhan Mistry (dead) by Lrs. And another vs. Achhiabar Mistry and others, AIR 1997 SC 456**, it was held that usufructuary mortgage cannot by mere assertion of his own or by a unilateral act on his part, assert himself to be the absolute owner. It was held to the following effect:-

“.....When it is extinguished by the act of parties the act must take the shape and observe the formalities which

the law prescribe. The expression “Act of parties” refers to some transaction subsequent to the mortgage and standing apart from the mortgage transaction. A usufructuary mortgagee cannot by mere assertion of his own or by a unilateral act on his part, convert his position on moiety of the property as mortgagee into that of an absolute owner.....”

Later, Hon'ble Supreme Court in **Hamzabi and others vs. Syed Karimuddin and others, (2001) 1 SCC 414**, held to the following effect:-

“2. The right of the mortgagor to redeem had its origin as an equitable principle for giving relief against forfeiture even after the mortgagor defaulted in making payment under the mortgage deed. It is a right which has defaulted in making payment under the mortgage deed. It is a right which has been jealously guarded over the years by courts. The maxim of “once a mortgage always a mortgage” and the avoidance of provisions obstructing redemption as “clogs on redemption” are expressions of this judicial protection. (See: *Pomal Kanji Govindji v. Vrajlal Karsandas Purohit (AIR 1989 SC 436)* in this context). As far as this country is concerned, the right is statutorily recognised in Section 60 of the Transfer of Property Act. The section gives the mortgagor right to redeem the property at any time after the principal money has become due by tendering the mortgage money and claiming possession of the mortgaged property from the mortgagee. The only limit to this right is contained in the proviso to the section which reads:

“Provided that the right conferred by this section has not been extinguished by act of the parties or by decree of a court.”

3. While the expression “decree of court” is explicit enough, the phrase “act of parties” has given rise to

controversy. One such act may be when the mortgagor sells the equity of redemption to the mortgagee. This Court in *Narandas Karsondas v. S.A. Kamtham* ((1977) 3 SCC 247) has said : (SCC p.254, para 34)

“In India it is only on execution of the conveyance and registration of transfer of the mortgagor's interest by registered instrument that the mortgagor's right of redemption will be extinguished”.

Thus, the right of redemption by act of parties can be extinguished by independent contract subsequent to the mortgage and not by an unilateral act on the part of the mortgagee under the mortgage.

In **Ganga Dhar's case (supra)**, Hon'ble Supreme Court was examining a mortgage which was for a period of 85 years but the same was sought to be redeemed before the expiry of the said period on the ground that such long period amounts to clog on redemption. The Court held to the following effect: -

“ The right of redemption, therefore, cannot be taken away. The Courts will ignore any contract the effect of which is to deprive the mortgagor of his right to redeem the mortgage. One thing, therefore is clear, namely, that the term in the mortgage contract, that on the failure of the mortgagor to redeem the mortgage with the specified period of six months the mortgagor will have no claim over the mortgaged property, and the mortgage deed will be deemed to be deed of sale in favour of the mortgagee, cannot be sustained. It plainly takes away altogether, the mortgagor's right to redeem the mortgage after the specified period. This is not permissible, for “once a mortgage always a mortgage” and therefore always redeemable. The same result also follow from S.60 of the Transfer of Property Act.....”

The said judgment was quoted extensively by the Hon'ble Supreme Court in **Harbans's case (supra)**, which arose out of a judgment of this Court reported as **Harbans vs. Om Parkash, 1998(2) PLR 172**.

The order passed by this Court is reproduced for ready reference:-

- “1. This is plaintiff's second appeal.
2. Plaintiff filed civil suit contending therein that the land in dispute was mortgaged by the ancestors of one Bhira with the fore-fathers of plaintiff and mortgage has not been got redeemed by the mortgagor within 30 years and so, the plaintiff and defendants 2 and 3, have become owners by efflux of time. Upon notice of suit, defendant No.1 contested the suit and alleged that mortgage has already been redeemed. He denied that plaintiff and defendants 2 and 3 have become owners by efflux of time. Trial Court decreed the suit, but on appeal by defendant No.1 judgment of the trial Court has been modified and it has been held that plaintiff and defendants 2 and 3 have not become owners as there is no period of limitation to redeem usufructuary mortgage. It has, however, been held that defendant No.1 has failed to prove the mortgage has been redeemed. Against the judgment and decree of the first appellate Court, plaintiff has come in second appeal.
3. Learned counsel appearing on behalf of plaintiff relying upon judgment of the Apex Court in *State of Punjab and others vs. Ram Rakha and others*, J.T. 1997(2) SC 577, has contended that by not redeeming the mortgage within the stipulated period, mortgagor has lost right to redeem the same.
4. After hearing the counsel and going through the record, I am of the view that the judgment cited by the counsel for plaintiff in *Ram Rakha's case (supra)*, the point in issue was not considered. In this case, it is the admitted case of the parties that mortgagee is in

possession of the property in dispute and no evidence has been brought on record by the mortgagee to show that mortgage was for a fixed period. **Since no time was prescribed for redeeming the land, the mortgagor has the right to get the property redeemed, there being no limitation for redeeming the said mortgage** (emphasis supplied). In this regard, reference be made to judgment in *Panchanan Sharma v. Basudeo Prasad Jaganani and others*, 1995 HRR 575. Consequently, this appeal being without any merit shall stand dismissed”.

This Court has relied upon **Panchanan Sharma's case (supra)** and distinguished **State of Punjab vs. Ram Rakha, (1997) 10 SCC 172** and held that usufructuary mortgage is always redeemable. The appeal of the mortgagee was dismissed by the Supreme Court in **Harbans's case (supra)** with a quote from Dr. Rashbehary Ghose's work, to the effect “that once a mortgage always a mortgage and is always redeemable”.

In **Panchanan Sharma's case (supra)**, Hon'ble Supreme Court has held that if the deed gives time for redemption or adjustment of the rent or profits and liabilities in terms of the contract, the limitation for redemption would run from the date fixed in the mortgage deed. Otherwise, there is no limitation for redemption of usufructuary mortgage. It was held to the following effect:-

“Though it is not necessary for the purpose of this case to go into the question whether Ramtahal Singh is a benamidar for the first defendant, suffice to state that by operation of S.76(c), he is enjoined to pay land revenue to the Government and for the default committed by the mortgagee, when the property was sold, the mortgagor had not lost his right of redemption by the conduct and actions of the mortgagee. If the deed gives time for

redemption or adjustment of the rent or profits and liabilities in terms of the contract read with the relevant provisions of the Act stood discharged, the limitation for would run from the date fixed in the mortgage deed. Otherwise, there is no limitation for redemption of usufructuary mortgage. The usufructuary mortgagor does not lose his tile to the property or right to redemption by lapse of time.....”

Learned counsel for the mortgagees referred to a Full Bench judgment of this Court in **Shri Chand and other's case (supra)**. However, the primary question examined in the said case was validity of the oral mortgages effected prior to the enforcement of Section 59 of the Act in Haryana State. The Court found that oral or unregistered mortgages executed prior to applicability of section 59 of the Act to the State of Haryana were valid. Since the suit was filed against the dead persons and the application for impleading the legal representatives was filed after period of 30 years from the date of mortgage, the Court dismissed the suit while allowing the revision petition. The question that as to when the period of limitation would run in case of usufructuary mortgage was not examined nor raised in the aforesaid judgment.

In **Sampuran Singh's case (supra)** the primary question revolved around acknowledgment of the mortgage. Although the said judgment supports the argument raised by learned counsel for the mortgagee but the judgment of the larger Bench including that of **Seth Ganga Dhar's case (supra)** were not noticed. The said judgment is on the lines of another judgment of Hon'ble Supreme Court in **Ram Rakha's case (supra)** which was noticed in **Harbans's case (supra)** and it was held that the said decision does not lay down correct position in law.

In **Prabhakaran's case (supra)**, the primary question again was in respect of acknowledgment. Though in para No.13 of the judgment it has been observed that in case of a usufructuary mortgage which does not fix any date for repayment of the mortgage money, the right to redeem would accrue immediately on execution of the mortgage deed. But said observation is obiter inasmuch as Hon'ble Supreme Court has allowed the appeal of the mortgagor for redemption while holding that there is acknowledgment. Therefore, the said judgment provides little assistance to the mortgagees.

After considering the aforesaid judgments, we respectfully agree that the view of the Full Bench of this Court in **Lachhman Singh's case (supra)** and that of Patna High Court in **Jadubans Sahai's case (supra)**. The provisions of Sections 60, 62 and 67 of the Transfer of Property Act are not applicable within the jurisdiction of this Court. Therefore, these provisions are required to be interpreted keeping in view the principles of equity and good conscience. Since the mortgage is essentially and basically a conveyance in law or an assignment of chattels as a security for the payment of debt or for discharge of some other obligation for which it is given, the security must, therefore, be redeemable on the payment or discharge of such debt or obligation. That is the view of the Hon'ble Supreme Court in **Pomal Kanji Govindji's case (supra)** wherein it has also been held that poverty should not be unduly permitted to curtail one's right to borrow money. Since at one point of time the mortgagor for one or the other reason mortgaged his property to avail financial assistance on account of necessities of life, the mortgagor's right cannot be permitted to be defeated only on account of passage of time. The interpretation sought

to be raised by the mortgagees is to defeat the right of the mortgagor and is wholly inequitable and unjust. The mortgagee remains in possession of the mortgaged property; enjoys the usufruct thereof and, therefore, not to lose anything by returning the security on receipt of mortgage debt.

Section 60 of the Act is general in nature applicable to all kinds of mortgages including usufructuary mortgage which is evident from clause (b) of Section 60 of the Act, where the mortgagee in possession of the mortgaged property is required to deliver possession to the mortgagor. But section 62 of the Act is a special provision dealing only with the rights of usufructuary mortgagor. In terms of clause (a) of section 62 of the Act, the suit is for possession after the mortgage comes to an end by self redeeming process as the mortgagee is authorised to pay himself the mortgage money from the rents and profits of the property. The mortgagee has to look to the rents and profits only to repay himself and when his entire charge is so liquidated he must re-deliver possession of the mortgaged property to the mortgagor. However, in terms of clause (b) of section 62 of the Act, the right of the mortgagor will arise only after rents and profits derived by the mortgagee out of the usufruct of the mortgaged property are adjusted towards the interest or the principal and on mortgagor paying the balance in the manner prescribed. In such mortgages, rents and profits are to be set off against interest and the mortgagee is entitled to retain possession until such time as the mortgagor chooses to redeem on payment of the principal sum secured. Such right for possession will accrue after the mortgage money is paid off.

The limitation of 30 years under Article 61(a) beings to run “when the right to redeem or the possession accrues”. The right to

redemption or recover possession accrues to the mortgagor on payment of sum secured in case of usufructuary mortgage, where rents and profits are to be set off against interest on the mortgage debt, on payment or tender to the mortgagee, the mortgage money or balance thereof or deposit in the court. The right to seek foreclosure is co-extensive with the right to seek redemption. Since right to seek redemption accrues only on payment of the mortgage money or the balance thereof after adjustment of rents and profits from the interest thereof, therefore, right of foreclosure will not accrue to the mortgagee till such time the mortgagee remains in possession of the mortgaged security and is appropriating usufruct of the mortgaged land towards the interest on the mortgaged debt. Thus, the period of redemption or possession would not start till such time usufruct of the land and the profits are being adjusted towards interest on the mortgage amount. In view of the said interpretation, the principle that once a mortgage, always a mortgage and, therefore always redeemable would be applicable.

The argument that after the expiry of period of limitation to sue for foreclosure, the mortgagees have a right to seek declaration in respect of their title over the suit property is not correct. From the aforesaid discussion, it is apparent that the mortgage cannot be extinguished by any unilateral act of the mortgagee. Since the mortgage cannot be unilaterally terminated, therefore, the declaration claimed is nothing but a suit for foreclosure. It is equally well settled that it is not title of the suit, which determines the nature of the suit. The nature of the suit is required to be determined by reading all the averments in the plaint. Such declaration cannot be claimed by an usufructuary mortgagee.

Thus, we prefer to follow the dictum of law laid down by

the larger Bench in **Seth Ganga Dhar's case (supra)** as well as judgments of Hon'ble Supreme Court in **Jayasingh Dnyanu Mhoprekar's case (supra)**, **Pomal Kanji Govindji's case (supra)**, **Panchanan Sharma's case (supra)** and **Harbans's case (supra)** in preference to the judgments relied upon by the mortgagees in **Prabhakaran's case (supra)** and **Sampuran Singh's case (supra)**.

Therefore, we answer the questions framed to hold that in case of usufructuary mortgage, where no time limit is fixed to seek redemption, the right to seek redemption would not arise on the date of mortgage but will arise on the date when the mortgagor pays or tenders to the mortgagee or deposits in Court, the mortgage money or the balance thereof. Thus, it is held that once a mortgage always a mortgage and is always redeemable.

Having answered the questions of law framed, we do not find any merit in the present appeal filed by the mortgagees to seek declaration in respect of their title. The appeal is dismissed.

(Uma Nath Singh)
Judge

(Hemant Gupta)
Judge

December 12, 2007
ds / ks

(Rajive Bhalla)
Judge